

Advice Memorandum

DATE: April 23, 2010

TO : Martha Kinard, Regional Director
Region 16

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Sheraton Grand Hotel Dallas Fort 530-4090-3000
Worth Airport 530-4090-4000
Case 16-CA-26779 530-5400

The Region submitted this case for advice as to whether the Employer violated section 8(a)(1) and (5) by refusing to recognize the Southwest Regional Joint Board as its employees' collective-bargaining representative after the Joint Board disaffiliated from UNITE HERE and affiliated with Workers United, SEIU. We conclude that the Region should dismiss the Joint Board's charge, absent withdrawal, because UNITE HERE Local 353B has continuously been the Section 9(a) representative and never ceded its representational status to the Joint Board.

FACTS

The Parties' Bargaining History

Sheraton Grand Hotel Dallas Fort Worth Airport (the Employer) has had an established collective-bargaining relationship with UNITE HERE Local 353B and its predecessor, HERE Local 353. There is no record of a union certification or evidence regarding a voluntary recognition agreement. Collective-bargaining agreements effective January 1, 1997 through December 31, 2001 and December 31, 2001 through January 1, 2006 were between the Employer and HERE Local 353 and were executed by Local 353 officers. In those agreements, the Employer recognized "HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES UNION, LOCAL 353" as the unit employees' exclusive representative.

In 2004, HERE merged with UNITE to form UNITE HERE. Prior to the UNITE HERE merger, HERE had a two-tiered organizational structure consisting of Locals and the International; UNITE had a three-tiered structure, comprised of Locals, Regional Joint Boards, and the International. After the merger, the UNITE Joint Boards were integrated into the combined UNITE HERE operation. In principle, the Regional Joint Boards served as intermediate bodies that coordinated and supervised their affiliated Locals.

Accordingly, on January 19, 2005, Local 353 executed an affiliation agreement with the Southwest Regional Joint Board (Joint Board), which had jurisdiction over Texas. Pursuant to that agreement, all Local members became Joint Board members, all Local employees became Joint Board employees, and the Local transferred all its assets to the Joint Board. The affiliation agreement also gave the Joint Board's governing documents priority over the Local's Constitution and By-laws.

The Joint Board's Constitution states that all collective-bargaining agreements shall be executed in the Joint Board's name and that the Joint Board has exclusive authority to call a strike or terminate a strike. In addition, all initiation fees, dues, and assessments are to be paid to the Joint Board.

Willy Gonzalez was given responsibility for servicing the Employer's collective-bargaining agreement. UNITE HERE's International Vice President Bennett originally hired Gonzalez and assigned him to work on the International's Dallas organizing project. At some point, Gonzalez became the Joint Board's Texas Manager. He assigned business agent Reyna Ramos to assist with day-to-day contract administration for the Employer's bargaining unit.

Until mid-2006, Local 353 was composed of the Employer's approximately 100 hotel and restaurant employees and approximately 600 Skychef employees, who were subject to the Railway Labor Act. Gonzalez decided to separate these two employee groups into two different Locals, to protect the Sheraton Grand employees' interests. On July 21 and 22, 2006, the Local 353 President and Joint Board Manager Jean Hervey executed a reorganization agreement that created Local 353B for the Sheraton Grand employees. That agreement stated that continuity of representation would be maintained and, specifically, that "[t]he Joint Board shall remain the Sheraton Employees' collective bargaining representative."

Prior to this time, the Employer had been remitting dues to Local 353, despite the provision in the Joint Board's Constitution to the contrary. Effective August 5, 2006, the Employer began remitting dues to the Joint Board. A sampling of dues checkoff cards provided to the Region state that dues are to be paid to UNITE HERE Local 353B (or HERE Local 353) or its authorized representative.

During the period between the UNITE HERE merger and the Joint Board's disaffiliation from UNITE HERE, the Local continued to remain active in contract negotiation and

administration with significant assistance from the International and the Joint Board. Consistent with the Joint Board's Constitution, the collective-bargaining agreement in effect from January 1, 2006 to December 31, 2009 described the union representative on the cover page and in the initial paragraph as "UNITE HERE! SOUTHWEST REGIONAL JOINT BOARD." Gonzalez negotiated that agreement, with assistance from an employee bargaining committee of Local officers, stewards, and members, and executed the agreement on June 9, 2008 on behalf of UNITE HERE.

The Local officers and stewards assisted with processing grievances at the first and second steps. Business agent Ramos, who reported to Gonzalez, also dealt with issues that arose in the workplace and assisted in processing grievances. Gonzalez handled grievances at the third step and at arbitration and was responsible for filing any unfair labor practice charges. The International paid the salaries of all Joint Board employees, including Gonzalez, Ramos, and Joint Board Manager Hervey.

The Joint Board's Disaffiliation from UNITE HERE

On March 7, 2009,¹ the Joint Board Executive Board voted unanimously to disaffiliate from UNITE HERE. Later that day, a majority of the Joint Board delegates also voted for disaffiliation and to authorize the Executive Board to form a new union and explore affiliation with the SEIU. That same day, Hervey sent the Employer a proposed form Memorandum of Understanding that sought to strike any reference to UNITE HERE in the collective-bargaining agreement and to name the Joint Board as the exclusive bargaining representative. The Employer never executed this Memorandum.

From March 9 through March 13, approximately 85 unit employees signed a petition supporting the Joint Board's disaffiliation from UNITE HERE and retention of the "Joint Board and/or our Local" as their collective-bargaining representative. This petition was never provided to the Employer. A few days later, Gonzalez met with the Local 353B officers, who indicated that they wanted to remain affiliated with UNITE HERE. Those officers then circulated a second petition, also signed by approximately 85 employees, stating that they wanted to be represented by Local 353B and "stay with" UNITE HERE, and did not want to be represented by the Joint Board. At about this same time, Gonzalez spoke to Employer General Manager Byron

¹ All dates are in 2009 unless otherwise noted.

Davis and told him that UNITE HERE continued to represent the employees.

On March 21, the Joint Board joined with several other former UNITE HERE Joint Boards to form Workers United. The following day, Workers United affiliated with the SEIU. Hervey, who had resigned her position with UNITE HERE but continued to serve as the Joint Board Regional Director, was elected a Workers United Vice-President. In late March and early April, most Joint Board staff members resigned from UNITE HERE and became Workers United employees. Gonzalez, Ramos, and Augustine Diaz remained with UNITE HERE.

By letter dated March 26, UNITE HERE President (Hospitality Industry) John Wilhelm advised the Employer that UNITE HERE was litigating the legality of the Joint Board's disaffiliation under the UNITE HERE constitution. He asserted that UNITE HERE remained the employees' collective-bargaining representative, the UNITE HERE Locals remained UNITE HERE affiliates, and any recognition of another union would be unlawful.

Hervey wrote to the Employer the following day, on Workers United letterhead, asserting that the Joint Board remained the unit employees' Section 9(a) representative and that the same stewards and Joint Board representatives would continue to service the collective-bargaining agreement. Hervey also requested that the Employer continue to remit dues to the Joint Board and refrain from responding to anyone else who claimed to represent the unit employees. However, during April, May, and June, the Employer sent checked-off dues to Local 353B, pursuant to Ramos' instructions.

On April 6, the Joint Board again wrote to the Employer, reasserting that it was the collective-bargaining representative. Hervey informed the Employer that Maria Campos and Juana Ramirez would be servicing the unit and that Gonzalez and Ramos no longer were employed by the Joint Board and should be denied access to the facility.

That same day, the Employer denied access to Ramirez and Campos. In a telephone call with Joint Board Political Director Garrick Farria, followed up by an April 7 letter, Davis stated that the Employer had a binding agreement with UNITE HERE and it would not be appropriate to have representatives from another union interfering with that agreement. On April 22, Ramos and a Local officer gave Davis the employee petition supporting Local 353B's continued affiliation with UNITE HERE.

The Employer began escrowing dues in July. The Employer continues to abide by the collective-bargaining agreement in all other respects. The contract expired on December 31; both UNITE HERE and the Joint Board have requested to bargain for a successor agreement, but no bargaining has occurred. The Local expects Gonzalez to negotiate the successor agreement.

Ramos continues to service the contract, and the parties have resolved disputes that have arisen since March without any grievance filings. There have also been no changes in the Local officers or stewards or in their responsibilities.

The Joint Board filed the instant Section 8(a)(5) charge on May 8, alleging that the Employer has failed and refused to recognize and grant access to the Joint Board's representatives, while allowing access to and recognizing individuals who are no longer authorized to represent the Section 9(a) bargaining representative. On September 23, the Joint Board amended the charge to allege also that the Employer has unlawfully refused to remit deducted dues.

ACTION

We conclude that, prior to the Joint Board's disaffiliation from UNITE HERE, Local 353B was the Section 9(a) representative of the unit employees and had not transferred its representational status to the Joint Board. We also conclude that there was substantial continuity in representation and the Local remained the employees' bargaining representative after the Joint Board disaffiliated from UNITE HERE and the Local remained affiliated with UNITE HERE. Accordingly the Employer did not violate Section 8(a)(1) and (5) by refusing to recognize or grant access to the Joint Board or by refusing to remit checked-off dues to the Joint Board after its disaffiliation from UNITE HERE.

UNITE HERE Local 353B Did Not Transfer Its Representational Status to the Joint Board.

An employer's obligation to bargain extends only to the statutory representative selected by a majority of the unit employees.² While the Section 9(a) representative may delegate some authority to an agent to act on its behalf, it cannot delegate all its responsibilities to another

² See, e.g., Nevada Security Innovations, Ltd., 341 NLRB 953, 955 (2004).

union and demand that the employer bargain with that union.³ The Board has found an improper delegation of representation where the designated Section 9(a) representative "bow[s] out" of its duties and attempts a wholesale substitution of another union.⁴

At the same time, another union can acquire the status of a joint Section 9(a) representative based upon the parties' conduct.⁵ For example, in American Medical Response, the Board found that although the recognition agreement named only the International, the Local was a joint representative where the Local also was a party to the collective-bargaining agreement, the Local maintained and enforced that agreement, the dues authorization cards identified the Local as the bargaining representative, and

³ Compare Nevada Security Innovations, Ltd., 341 NLRB at 953, fn.1, 955-56 (employer violated Section 8(a)(5) by refusing to bargain with certified representative, the International, where the International had merely delegated some of its duties to its Local); Mountain Valley Care & Rehabilitation Center, 346 NLRB 281, 282-83 (2006) (same); with Goad Co., 333 NLRB 677, fn.1, 679-80 (2001) (where Section 9(a) representative improperly sought to transfer all its representational responsibilities to its sister Local, the employer lawfully refused to bargain with the sister Local).

⁴ See Goad Co., 333 NLRB at 679-80 (agreement between Section 9(a) representative and its purported "agent" "stands the law of agency on its head" by absolving the principal of liability for its purported agent's actions and confirmed that the principal was "bowing out" of its representational duties); Sherwood Ford, Inc., 188 NLRB 131, 133-34 (1971) (resolution provided that Section 9(a) representative would carry out instructions of its purported agent, and "it was there that the switch became manifest, for the dog had now become the tail").

⁵ See, e.g., Mail Contractors of America, Inc., 346 NLRB 164, 167 (2005) ("weight of the evidence" arguably established that International and Local were recognized as joint representatives at first bargaining session, where contract language made both parties to the collective-bargaining agreement); Tree-Free Fiber Co., 328 NLRB 389, fn.4, 397-98 (1999) ("longstanding past practice" established International and its two Locals were joint collective-bargaining representatives where contract named two signatory Locals in recognition clause but was also executed by International, contractual grievance procedure provided for International's involvement, and International historically participated in contract negotiations).

both the Local and the International were going to participate in upcoming negotiations.⁶

Here, the Joint Board did not supplant Local 353(B) as the Section 9(a) representative through a delegation of representational responsibilities or even become a joint Section 9(a) representative with Local 353B. Instead, the evidence shows that the Joint Board acted as the Local's agent through Gonzalez's and Ramos' assistance in contract negotiation and administration.

Prior to the 2004 merger between UNITE and HERE, Local 353 negotiated and executed the collective-bargaining agreements. In those agreements the Employer recognized the Local as the Section 9(a) representative.

Even after the UNITE HERE merger and the Local's affiliation with the Joint Board, the Local never "bowed out" of its representational role. Thus, although the affiliation agreement transferred Local assets to the Joint Board, the Local officers continued to remain active in contract administration through their role in the grievance process, and Local officers and stewards continued to participate in contract negotiations through an employee bargaining committee. While the parties' most recent contract for the first time named the Joint Board as the contracting union, we conclude that this change in itself is insufficient to constitute a transfer of the Local's representational status to the Joint Board or to make the Joint Board a joint representative.⁷ Instead, the Local continued as the Section 9(a) representative, operating with assistance from the Joint Board as its authorized agent.

There Was Substantial Continuity after the Joint Board Disaffiliated from UNITE HERE and Local 353B Separated from the Joint Board.

An employer's obligation to recognize and bargain with the incumbent union following a change in affiliation

⁶ 335 NLRB 1176, 1178-79 (2001) (Local and International both held liable as joint representatives for Section 8(b)(1)(A) and (2) violations based upon their extension of contract to employees improperly accreted into the bargaining unit).

⁷ Cf. Mail Contractors of America, Inc., 346 NLRB at 167 (evidence indicated that International and Local were recognized as joint representatives at the initial bargaining meeting and the initial contract identified both as parties to the agreement).

continues "unless the changes resulting from the merger or affiliation are so significant as to alter the identity of the bargaining representative."⁸ In determining whether there is "substantial continuity" in representation, the Board examines "the totality of the circumstances,"⁹ and considers a number of factors, including the union officials' responsibilities, membership rights and duties, the dues/fees structure, governing documents, the manner in which contract negotiations and administration are handled, and the representative's assets.¹⁰

Applying those principles here, we conclude that Local 353B continues as the Section 9(a) representative. The Local officers and stewards have remained the same and continue to exercise the same functions as before. In addition, the Local's reliance upon Gonzalez's and Ramos' assistance in contract administration has not changed; and the Local expects Gonzalez to be the lead negotiator again when negotiations for a successor contract begin. Dues have remained constant although they will now be collected by the Local rather than its agent. There is also no evidence that the Local's governing documents have changed. In these circumstances, we conclude that the Local continues as the Section 9(a) representative.

Accordingly, the Employer lawfully refused to recognize and denied access to the Joint Board's representatives. The Employer also properly stopped remitting checked-off dues to the Joint Board following its disaffiliation from UNITE HERE.¹¹ Therefore, the Region should dismiss the instant charge, absent withdrawal.

B.J.K.

⁸ Raymond F. Kravis Center for the Performing Arts, 351 NLRB 143, 147 (2007), *enfd.* 550 F.3d 1183 (D.C. Cir. 2008).

⁹ Mike Basil Chevrolet, 331 NLRB 1044, 1044 (2000) (amending certification to reflect change in affiliation).

¹⁰ See Western Commercial Transport, 288 NLRB 214, 217 (1988) (dismissing petition to amend certification where affiliation effected "dramatic change" in the bargaining representative).

¹¹ Although the Employer may have violated Section 8(a)(1) and (5) by failing to remit checked-off dues to Local 353B, the Local has not filed a charge challenging the escrowing of dues.